In the Supreme Court of the United States

OCTOBER TERM, 1958.

No. 503.

EMERSON R. GYNN,

Petitioner,

vs.

MARY P. GYNN,

Respondent.

BRIEF OF RESPONDENT.

J. VIRGIL CORY,
2500 Terminal Tower,
Cleveland 13, Ohio,
Attorney for Respondent.

A. E. GRIFFITH, *Of Counsel.*

MARK O'NEILL, *On the Brief.*

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TABLE OF CONTENTS.

Questions Presented 1

Statement of the Case 2

Argument 5

I. Certiorari should not be granted because the state appellate courts did not directly rule on any seasonably presented constitutional question 5

II. The Fourteenth Amendment does not require a state court to give direct personal notice of the date and hour of a divorce trial to a party who acts as attorney pro se, where that party has been served with summons and a copy of the complaint, has entered his appearance by filing an answer and has been notified constructively of the immediacy of trial by the court's publication of the case in the "Active List" of its official newspaper 6

TABLE OF AUTHORITIES.

Cases.

Cuyahoga River Power Company v. Northern Realty Company, 244 U. S. 300, 37 Sup. Ct. 643 5

Fox Film Corporation v. Miller, 296 U. S. 207, 56 Sup. Ct. 183 5

Radio Station W. O. W., Inc. v. Johnson, 326 U. S. 120, 65 Sup. Ct. 1475 5

Constitution.

Constitution of the United States, Fourteenth Amendment 1, 5, 6

Statutes.

Ohio Revised Code:
Sec. 2325.01(C) 3
Sec. 2505.07(A) 3

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QUESTIONS PRESENTED.

I.

Should this Court grant certiorari with respect to a state supreme court judgment which dismissed petitioner's appeal following his failure to perfect a seasonable appeal to the state's intermediate appellate court?

II.

Does the Fourteenth Amendment's requirement of due process require a state court to give direct, personal notice of the date and hour of a divorce trial to a party who acts as attorney *pro se*, where that party has been served with summons and a copy of the complaint, has entered his appearance by filing an answer and has been notified constructively of the immediacy of trial by the court's publication of the case in the "Active List" of its official daily newspaper?

STATEMENT OF THE CASE.

On March 20, 1952 respondent filed a petition for divorce and equitable relief against petitioner in the Court of Common Pleas of Cuyahoga County, Ohio. Petitioner was then a prisoner in the Ohio State Penitentiary. Within eight days after the action was commenced, petitioner was served with summons and a copy of the divorce petition. Six weeks later, acting as attorney *pro se*, petitioner filed his answer to the petition.

Respondent thereafter filed a motion to advance the cause for trial. Counsel for respondent mailed a copy of this motion to petitioner. The motion was granted on May 28, 1952, and the case was ordered to the top of the trial list for June 9, 1952. The judge who advanced the case for trial issued a subpoena to the warden of the Ohio Penitentiary directing him to bring petitioner to Cleveland on June 9, 1952 to testify as a party defendant in the cause. The warden did not honor the subpoena or advise petitioner of the trial date.

Pursuant to the rules of practice of the Common Pleas Court, the case was published in the "Active List" of the Daily Legal News, the court's official newspaper. It so appeared on June 6, 1952. On June 9, 1952, the case came on for trial, the petitioner not appearing or being represented by an attorney. On the following day, June 10, 1952, a divorce decree was entered in favor of respondent as a part of which provisions were made for an award of property to her. On July 8, 1952 petitioner received a certified copy of the di orce decree.

Petitioner made no move to challenge the decree during the three years that followed. He remained in the Ohio Penitentiary until August 21, 1953. On July 1, 1955, two years after his discharge, he filed in the Court of Common Pleas a petition to vacate the divorce decree

upon the statutory ground that there had been "mistake, neglect or omission of the clerk, or irregularity in obtaining a judgment or order." Ohio Revised Code, Sec. 2325.-01 (C). A hearing was held on this petition. The Court of Common Pleas concluded that there had been no irregularity in obtaining the judgment as would warrant the vacation of the divorce decree. The petition to vacate was denied on May 11, 1957.

Instead of appealing from this judgment to the Court of Appeals, petitioner filed a motion for new trial in the Court of Common Pleas. The motion for new trial was filed on May 21, 1957, and it was overruled on June 26, 1957. On August 14, 1957 petitioner filed a notice of appeal in the Court of Appeals.

The Court of Appeals concluded, *inter alia*, that it was without jurisdiction to entertain the appeal, inasmuch as petitioner had failed to appeal to the Court of Appeals within the jurisdictional time specified by statute (20 days following the rendition of a final order in the trial court). Ohio Revised Code, Sec. 2505.07(A). The Court of Appeals held that the petition to vacate the divorce decree under Sec. 2325.01 was a special statutory proceeding essentially in the nature of a motion for new trial after term and that there was no statutory authority for petitioner's motion for a new trial as to the order of the lower court denying the petition to vacate. It stated, in effect, that a motion for new trial could not lie as to an order overruling a motion for new trial; the second motion for new trial would not toll the time for appealing from the denial of the first motion. As the Court of Appeals stated:

> "One other question appearing in the record should be here considered and that is whether the notice of appeal, filed August 14, 1957, vested this court with jurisdiction of this appeal.

"This is a special proceeding by which a party to an action seeks a new trial upon the vacation of judgment after term. Section 2325.01 Revised Code, as applicable here, provides in part:

'The Court of Common Pleas or the Court of Appeals may vacate or modify its own final order, judgment, or decree after the term at which it was made:

'* * *

'(C) For mistake, neglect, or omission of the clerk, or irregularity in obtaining a judgment or order.'

"* * * There is no provision of the statute providing for a retrial of the questions presented by a party seeking relief from a judgment after term under Section 2325.01, Revised Code. While an order entered under these sections is a final order * * * that is, an order affecting a substantial right made in a special proceeding, and is, therefore appealable, it is not, in fact, a final determination of the rights of the parties *to which a motion for new trial may be addressed.*

It is in legal affect a motion for new trial especially provided for after term upon the specific grounds set out by Section 2325.01, Revised Code. *There is no statutory right to seek a retrial in such special proceeding after the court judgment has been journalized.* The time within which a notice of appeal must be filed is, therefore, not tolled after the journalization of such judgment by filing a motion for new trial. A notice of appeal filed 95 days after the order from which the appeal is taken does not vest this court with jurisdiction of the appeal. We are, therefore, constrained to hold that this court is without jurisdiction to entertain this appeal.

"Judgment accordingly." (Emphasis supplied.) 106 Ohio App. 132, 135-136.

The Court of Appeals also stated, before holding that it was without jurisdiction to entertain the appeal, that it

had examined the record carefully and was satisfied that there was credible evidence in support of the conclusion of the Common Pleas Court that no irregularity was established on the record to warrant vacation of the divorce decree.

Petitioner appealed as a matter of right to the Supreme Court of Ohio charging violation of the due process requirement of the Fourteenth Amendment. The Supreme Court dismissed the appeal "for the reason that no debatable constitutional question is involved." 168 Ohio St. 164; 151 N. E. 2d 46.

ARGUMENT.

I. CERTIORARI SHOULD NOT BE GRANTED BECAUSE THE STATE APPELLATE COURTS DID NOT DIRECTLY RULE ON ANY SEASONABLY PRESENTED CONSTITUTIONAL QUESTION.

It is settled that this Court will not review the decisions of state courts which are founded upon nonfederal grounds. It is likewise settled that where the decision of a state court rests upon a federal ground and an independent nonfederal ground, and its decision as to the nonfederal ground is adequate to support its judgment, this Court will not take jurisdiction. *Fox Film Corporation v. Miller*, 296 U. S. 207, 56 Sup. Ct. 183; *Cuyahoga River Power Company v. Northern Realty Company*, 244 U. S. 300, 37 Sup. Ct. 643. It has also been held that this Court will not question the correctness of the state court's judgment on the nonfederal ground unless it was an obvious subterfuge to evade consideration of a federal issue. *Radio Station W. O. W., Inc. v. Johnson*, 326 U. S. 120, 65 Sup. Ct. 1475.

The judgment of the Supreme Court of Ohio was merely that "no debatable constitutional question is involved."

In view of the explicit holding of the Court of Appeals that it lacked jurisdiction to entertain the appeal, the subsequent judgment of the Supreme Court dismissing petitioner's appeal is explicable only on the hypothesis that a constitutional question was not "debatable" because it had not been presented seasonably. This view of the Supreme Court's judgment would seem more appropriate under the circumstances of the present case than an assumption that the court actually considered the merits. Since its judgment would appear to be founded on jurisdictional grounds relevant to state procedural law, and not upon a seasonably presented constitutional issue, certiorari should not be granted.

II. THE FOURTEENTH AMENDMENT DOES NOT REQUIRE A STATE COURT TO GIVE DIRECT PERSONAL NOTICE OF THE DATE AND HOUR OF A DIVORCE TRIAL TO A PARTY WHO ACTS AS ATTORNEY PRO SE, WHERE THAT PARTY HAS BEEN SERVED WITH SUMMONS AND A COPY OF THE COMPLAINT, HAS ENTERED HIS APPEARANCE BY FILING AN ANSWER AND HAS BEEN NOTIFIED CONSTRUCTIVELY OF THE IMMEDIACY OF TRIAL BY THE COURT'S PUBLICATION OF THE CASE IN THE "ACTIVE LIST" OF ITS OFFICIAL NEWSPAPER.

Procedural due process comprehends notice of a charge and reasonable opportunity to defend against it before a tribunal which will give a fair hearing. The opportunity to be heard demanded by the Fourteenth Amendment is not something larger than opportunity. The Amendment does not guarantee that the requisite opportunity will be wisely used. It does not require states to take unusual steps to save harmless those whose imprudence nullifies the opportunity which the law fairly accords. Once a reasonable opportunity to defend has been

given, subsequent improvidence will not create a constitutional issue.

Petitioner here was duly served with summons and a copy of the petition for divorce. He knew of the precise charge, the court in which it would be tried, and the time by which he would have to answer. He was thus given an opportunity to make his defense. What he did with that opportunity was up to him.

Since petitioner was a layman and in prison, it was impossible for him to act effectively as an attorney in any cause. However, rather than engage counsel through Legal Aid or otherwise, or instead of communicating with the court to seek a stay of proceedings until his disability ended, petitioner resolved to act as attorney *pro se*, and in this capacity he filed an answer to the petition.

The Court of Common Pleas had no rule of court which provided for the issuance of direct personal notice to parties or attorneys of the date and hour on which their cases might be reached for trial. Pursuant to rule of court however the present case was published in the "Active List" of civil cases in the court's official newspaper, and the immediacy of its trial was thereby indicated. On the third day after publication it was called for trial. Petitioner's lack of knowledge of this is solely attributable to his decision to act as his own legal representative.

The court actually went further than required by statute or its own rules of practice to safeguard petitioner's interests. One of the judges of the court issued a subpoena to the warden of the penitentiary directing that petitioner be brought to Cleveland to attend the trial of the action. While the warden was not legally obligated to conduct the prisoner to a county farther away than an adjoining county, there is nothing in the record to suggest that at

the time the court issued its subpoena it considered that it was acting in vain.

The record establishes that petitioner was fully notified of the charge against him and had opportunity to arrange for a competent defense. It establishes that three days prior to trial, pursuant to rule of court, the immediacy of trial was indicated through publication of the case in the court's official newspaper. It further attests to an extraordinary effort by the court to have petitioner actually brought to Cleveland for trial. There is nothing to suggest that petitioner received any lesser degree of notice than any other party with a cause before the court. Though petitioner claims he was entitled to direct personal notice of the date and hour of trial, it is perhaps significant that he fails to mention any statute that was violated or any rule of court which was overlooked. Indeed, he cites no authority of any kind for the proposition that due process was denied him.

The petition should be denied.

Respectfully submitted,

J. VIRGIL CORY,
Attorney for Respondent,
2500 Terminal Tower,
Cleveland 13, Ohio.

A. E. GRIFFITH, *Of Counsel,*
MARK O'NEILL, *On the Brief.*